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Case No. 80-1430

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

TED ENGLE, Superintendent,
Chillicothe Correctional Institute,
Petitioner,

v.

LINCOLN ISAAC,
Respondent.

E. P. PERINI, Superintendent,
Marion Correctional Institution,
Petitioner,

v.

KENNETH L. BELL
Respondent.

TED ENGLE, Superintendent,
Chillicothe Correctional Institute,
Petitioner,

v.

HOWARD HUGHES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF TO BRIEFS IN OPPOSITION TO CERTIORARI

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STATEMENT OF THE CASE

In Isaac's answer to the petition, Isaac states "There was no evidence except the testimony of the defendant and the victim as to who threw the first punch". Page 2. That statement is a misstatement. At trial, Isaac's ex-wife testified as to seeing Isaac initiate the assault on the victim which resulted in serious injuries. Bell and Hughes, like petitioners and the courts below, have recognized that the questions involved in these cases are matters of law far transcending the facts of the individual cases. Accordingly the disputed versions of the facts in those cases have not been argued in the respective answers to the petition.

REPLY ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

A. IMPACT OF DECISION

To characterize this case as "Much Ado About Nothing" is a misrepresentation of the first order. Respondents Hughes and Isaac both point to the fact that in the interim of the legal proceedings below they received final releases as a matter of parole, thus terminating the possibility of their reincarceration. It is incongruous at best however that having successfully undermined the finality of Ohio convictions between 1974-1978 involving affirmative defenses that Hughes and Isaac should assert finality as a defense to why certiorari should not be granted. While conceding that the interest of a particular custodian may be academic, such custodians as agents of the State and as represented by the chief law enforcement agent of such State are proper parties to present to this Court the havoc caused by the decisions of the court below. It would be a travesty indeed if the State of Ohio were required to free even one person convicted of homicide under the decision of he court below. Yet Isaac and Hughes, who would have every right to seek certiorari, if roles were reversed, seek to insulate what they have accomplished.

Petitioners noted in the initial petition the status of the parties so as not to misrepresent to this Court the actual relationships of the parties. Respondent Bell, whose case is

still "live" to the extent he remains in prison, seeks to argue that the decision affects only 25 cases, the figure of actual cases at the time the petition was filed. Yet it is the potential which should control. New cases have been filed and bail has been sought by convicted criminals - including Bell - based on such cases as precedent. That the floodgates have not opened more in the interim is simply a factor that the courts below are awaiting this Court's decision on certiorari. In the interim, it should be noted that the Sixth Circuit has utilized the precedent of the cases below in other contexts, **Carter v. Jago**, 637 F. 2d 449 (6th Cir. 1980), and will continue to do so. While Issaac and Hughes may never be reincarcerated, their cases serve as useful representative samples of the context in which a live case like **Bell** should be decided.

As an attack on the impact of the cases, Bell and Hughes argue that the case has no precedential value in any other jurisdiction than Ohio, that the Sixth Circuit was not as split in their decision making as the opinion might appear and that no conflict is presented with other circuits. Such arguments are devoid of reality. Petitioner's whole argument is that the Sixth Circuit misapplied **Wainwright v. Sykes**, 433 U.S. 72 (1977), a case of national application. While admittedly, the context in which a **Wainwright** issue is raised might vary from jurisdiction to jurisdiction, the need for a uniform application of "cause and prejudice" is evident. These cases allow the court the opportunity to flesh out the parameters of "cause and prejudice". Moreover, this Court will have to determine for itself how split the Sixth Circuit was in resolving these cases. Petitioners would merely note the tremendous expenditure of judicial resources in reaching what respondents now seek to characterize as a "uniform" decision. Finally the Court should note the holding in **Cole v. Stevenson**, 620 F. 2d 1055 (4th Cir. 1980), not the distinction in facts to determine if a conflict in circuits exists. Petitioners assert that under the rationale of **Cole** - a correct reading of **Wainwright** - the result in these cases should be reversed.

As a final attack on the impact of these cases, Bell and Hughes argue that it is unnecessary to resolve the question of whether the constitution would allow a shifting of the burden of proof on self defense - asserting that this might more properly be raised when **Carter**, *supra* eventually reaches the Court. To this extent, this position has completely reversed from the briefs in the courts below. Therein, the argument was

posited that under Ohio law no affirmative defenses could constitutionally exist. Moreover, such argument attempts to end run the question presented by petitioners - if the constitution allows a shifting of the burden of proof on self defense, are criminal defendants deprived a fair trial when a state court instructs to such effect in contravention of a state statute which requires more? While such might be error under state law, does it automatically convert to a question of federal due process? The prior precedents of this Court are simply to the contrary. **Beck v. Washington,** 369 U.S. 541 (1962); **Wainwright v. Stone,** 414 U.S. 21 (1973); **Snowden v. Hughes,** 321 U.S. 1 (1943); **Milwaukee Electric Ry. Co. v. Wisconsin,** 252 U.S. 100 (1920). See also: **Bishop v. Mazurkiewicz,** 634 F. 2d 724 (3rd Cir. 1980). This is even more important when one considers that at some point: "the costs of retroactive application of new constitutional principles . . . exceed the possibility of enhanced reliability that may be obtained upon retrial". **Blackburn v. Thomas,** _____U.S._____, 49 U.S. 4210, 28 Cr. L. 2044 (February 23, 1981) Powell J., dissenting from certiorari.

B. COUNTER ARGUMENTS ON THE MERITS

All parties seem to recognize this case as complex. Yet in arguing against certiorari, Hughes and Bell argue Ohio is equitably estoppel by the "tangled nature" of Ohio precedent. Even a casual reading of the Ohio cases however will establish that the Ohio Supreme Court was making a conscientious effort to track the latest developments by this Court in the area of constitutional law. In **State v. Robinson,** 47 Ohio St. 2d 103 (1976), the Court, while not making a constitutional decision, was clearly aware of **Mullaney v. Wilbur,** 421 U.S. 684 (1975) in interpreting ORC Section 2901.05. Similarily, in resolving in **State v. Humphries,** 51 Ohio St. 2d 95 (1977) that a **Robinson** error would be deemed waived if no objection was raised, the Ohio Supreme Court was clearly aware of **Hankerson v. North Carolina,** 432 U.S. 233 (1977). Respondents simply assert that the Ohio Supreme Court should be forbidden to do as a matter of state law what this Court has done with respect to constitutional matters. Moreover as the ultimate irony, respondents assert that in attempting in good faith to avoid a potential **"Mullaney"** problem, the Ohio Courts created one.

In reaching this irony, respondents completely misstate Ohio law. Bell and Hughes argue that the shifting of the burden of proof on self defense under prior law was justified by a presumption as to the elements of the offense. **State v. Poole,** 33 Ohio St. 2d 18 (1973) is directly to the contrary - self defense is a true affirmative defense wholly apart from the elements of the crime. Secondly, Bell and Hughes argue that **State v. Abner,** 55 Ohio St. 2d 251 (1978) further tangled Ohio's law by eliminating an instruction on the state's burden to disprove an "element" of the offense - the absence of self defense. **Abner** merely clarified that despite the state statutory shift in the burden of proof on affirmative defenses - self defense still remained an affirmative defense and not an "element". As aptly stated by this Court:

> We usually walk on treacherous ground when we explore state law [footnote omitted] for state courts, state agencies, and state legislatures are its final expositors under our federal regime.

Brady v. Maryland, 373 U.S. 83, 90 (1963). See also: **Tennon v. Ricketts,** 574 F. 2d 1243 (5th Cir. 1978), *cert. denied,* 439 U.S. 1091; **United States ex rel Almeida v. Rundle,** 255 F. Supp. 936 (E.D. Pa.), *aff'd,* 383 F. 2d 421 (3rd Cir. 1967), *cert. denied,* 393 U.S. 863 (1964). By raising a question of error of state law to constitutional dimension, the courts below failed to heed this admonition.

Isaac's answer to the petition for certiorari returns to the panel decision - not relied on by the en banc court - and argues that Ohio's use of the contemporaneous objection rule to differentiate between those defendants who obtain the benefit of **Robinson** is arbitrary and capricious.[1] Aside from the fact that Ohio followed the suggestion of this Court in **Hankerson,**

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1 Isaac makes a further argument of denial of equal protection never raised in any court below. For the first time Isaac asserts discrimination between those persons who had jury trials and those tried to a court. The premise is that Rule 30, Ohio Rules of Criminal Procedure - the contemporaneous objection rule - is inapplicable to non-jury trials. Aside from the fact this is a new argument, there is nothing irrational about drawing a distinction between a self instructed trier of fact who is presumed to know the law and a jury which must be instructed as to controlling principles. **State v. Humphries,** *supra.*

such argument must fail. Apparently, Isaac would concede that Ohio did not need to make **Robinson** retroactive:

> A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court though later overruled, are law nonetheless for intermediate transactions.

Great Northern R. Co. v. Sunburst Oil and Refinery Co., 287 U.S. 358, 364 (1932); See also; **Wainwright v. Stone**, *supra*. Yet when Ohio limited its holding of retroactivity to those who raised the issue and sought to have it resolved, the decision somehow becomes arbitrary and discriminatory. Isaac's view simply gives no credence to the role of counsel in our system.

Our system of jurisprudence guarantees competent counsel. It does not however guarantee that all counsel will be of equal capabilities. Some counsel will perceive a new issue and raise it, thereby changing the law. Others will not have such foresight. To have a rationale system of jurisprudence, it is simply not necessary, or perhaps even desirable, that our system insures each defendant the benefits secured by the most able. An example is this Court's decision in **Brady v. United States**, 397 U.S. 742 (1970). There, like here, a waiver of a claim was being challenged on the basis that a subsequent decision had changed the parameters of the law which existed at the time of the waiver. Yet in rejecting the notion that the waiver should be disturbed, the Court forcused on the fact that when made the waiver was due in part to the actions of competent counsel. In doing so, the Court further rejected the notion that all defendants should get the benefit of a subsequent decision even though some defendants, who pursued the issue by trial and appeal would get such benefit.

In large measure, the "cause and prejudice" standard of **Wainwright** to be meaningful must be closely equated with the notion of ineffectiveness of counsel. If the failure of competent counsel to anticipate a new argument which some counsel do anticipate is "cause", then **Wainwright** returns to the "deliberate bypass standard" of **Fay v. Noia**, 372 U.S. 391 (1963). In the end, finality and society are the losers.

CONCLUSION

The present cases involve novel, complex and important issues to both the State of Ohio and the nation. Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b), Rules of the Supreme Court, I hereby certify that the requisite number of copies of the foregoing Reply Brief to Briefs in Opposition to Certiorari have been served on respondents Lincoln Isaac, Kenneth Bell, and Howard Hughes by forwarding such copies to the offices of their respective counsel, James R. Kingsley, 157 W. Main Street, Circleville, Ohio 43113 and Jay McKirahan, Suite 330, 22 East Gay Street, Columbus, Ohio 43215, counsel for Isaac; Richard L. Aynes, Appellate Review Office, School of Law, The University of Akron, Akron, Ohio 44325, counsel for Bell; and J. Dean Carro, Appellate Review Office, School of Law, The University of Akron, Akron, Ohio 44325, counsel for Hughes, by U.S. Mail, postage paid, this _____day of April, 1981. I further certify that all parties required to be served have been so served. The respondents' addresses are Lincoln Isaac, 310 Ray Avenue, Circleville, Ohio 43113; Kenneth Bell, No. 141-727, Marion Correctional Institution, P.O. Box 57, Marion, Ohio 43302, Howard Hughes, c/o Beasley Suites, 163 Rhodes Avenue, Akron, Ohio 43302.

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